



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-1

FACTS:

You are currently a city councillor. You wish to accept a simultaneous salaried position as director of a community action agency (ABC).

ABC is a non-profit corporation and a “community action agency” as that term is used in 42 U.S.C. §9902(1) and G.L. c. 23B, §24. A group of private individuals organized ABC in response to the federal Economic Opportunity Act of 1964. ABC’s by-laws state as its purpose, in part, “to work toward the reduction of poverty and the causes and effects thereof by making the city as well as other public institutions and organizations aware of the needs and interests of low-income people.” ABC receives most of its funding from the state and federal governments, and small amounts from the city and from private sources. The city sometimes contracts with ABC using part of the city’s allocation from the federal Community Development Block Grant (CDBG) program, as well as other federal, state, or city funds.

Your proposed position is funded solely by the federal Department of Energy, with funds passed through only the state government. The position is not funded at all from city funds, nor from state or federal funds over which the city exercises any discretionary control.

QUESTION:

Does G.L. c. 268A allow you to serve as both a city councillor and an ABC employee?

ANSWER:

Yes, subject to the following limitations.

DISCUSSION:

As a city councillor, you are a “municipal employee.” G.L. c. 268A, §1(g). Your request raises the following issues under the conflict of interest law.

Threshold question: is ABC a “municipal agency”?

Whether ABC is a “municipal agency” will significantly affect our analysis. We must therefore decide that issue first.

Our statute defines a “municipal agency” as “any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.” G.L. c. 268A, §1(f). To construe this definition (and the substantially identical ones of “county agency” and “state agency”), particularly the use of the word “instrumentality,” we have generally examined four factors:

1. the means by which the entity was created (e.g., legislative or administrative action);
2. the entity’s performance of some essentially governmental function;
3. whether the entity receives or expends public funds; and

4. the extent of control and supervision exercised by government officials or agencies over the entity. *See EC-COI-91-12; 88-2; 85-22; 84-65.*

Here, the second and third factors are certainly present to a considerable extent: ABC performs some governmental functions, and its budget depends almost entirely on government funds. But one or both of these statements are equally true of many other private, non-profit organizations, including several we have previously determined not to be government agencies. *See, e.g., EC-COI-88-19* (non-profit cable television public-access corporation, which received funds under city contract, not a “municipal agency”); *EC-COI-87-28* (advisory neighborhood council not “municipal agency”); *EC-COI-86-5* (state agency’s informal advisory committee not a “state agency”); *EC-COI-85-78* (non-profit “health systems agency” established under federal statute, which performed state health planning functions and received state funding, not a “state agency”).

We turn, then, to the first and fourth factors. As to the means of its creation, ABC was established by private citizens as (in the words of its present by-laws) “a private non-profit corporation.” *See EC-COI-90-7* (unless government agency creates entity to further its own purposes, purely private instrument generally does not establish government agency). It does receive federal and state grants, and to that extent federal and state statutes prescribe certain minimum standards, largely in terms of board composition as discussed below, that such “community action agencies” must meet. 42 U.S.C. §§9902(1) (defining “eligible entity” for federal Community Services Block Grant [CSBG] program funds to include a community action agency), 9904(c)(3) (regulating board composition of grant recipients); G.L. c. 23B, §24 (defining “community action agency,” prescribing board structure, and authorizing state contracts and grants under federal CSBG program). These grants and contracts place ABC in the same category of “at most a vendor corporation with respect to the state” as the health systems agency we concluded was not a “state agency” in *EC-COI-85-78*.

The history of community action agencies further supports this conclusion. “Community action programs,” as they were then known, resulted from sections 201 to 211 of the federal Economic Opportunity Act of 1964, Pub. L. 88-452, 78 Stat. 508, which first authorized federal grants to them. That Act’s language^{1/} and legislative history^{2/} make clear Congress’s intent to funnel most of these federal “anti-poverty” funds directly to organizations of low-income people rather than to municipal governments. In this respect, too, community action agencies are most similar to the health systems agencies that federal law required to be private, non-profit corporations. *EC-COI-85-78*, at 1, 3. They are unlike, for example, community development corporations established under a state statute. *See EC-COI-85-66* (such a CDC established at instance of city government is a “municipal agency”).

Our fourth factor, control and supervision, is decisive here. The above federal and state statutes, and ABC’s own by-laws, explicitly require that no more than one-third of the members of its Board of Directors be city officials or their designees. The remainder must be representatives of low-income neighborhoods or of private organizations including business, labor, and social service groups, and there is no suggestion here that these non-municipal representatives are in any way under the control, supervision, or influence of city officials. In this respect, ABC is similar to the non-profit holding company established by a state institution, which we recently concluded was not a “state agency” because “state-affiliated directors may comprise one-third or less of the total number of voting directors.” *EC-COI-91-12*, at 5 (emphasis original; footnote omitted). ABC thus differs from such government “instrumentalities” as a government agency’s retirement fund (*EC-COI-90-7*), a state college’s financial support foundation (*EC-COI-90-3*), a support corporation for a city redevelopment authority (*EC-COI-88-24*), and the regional employment boards entirely selected by municipal officials under federal law (*EC-COI-89-20; 83-74*), all of which we found were controlled by the “parent” agency.

We conclude that ABC is not a “municipal agency.” We therefore proceed to analyze your situation as if it were any other business organization.

Section 17

Section 17 of c. 268A prohibits a municipal employee from acting as an agent or attorney for, or receiving compensation^{3/} from, anyone other than the city or a municipal agency in connection with any particular matter^{4/} in which the city is a party or has a direct and substantial interest.

This section generally prohibits you from representing or personally appearing on behalf of a private third party (including ABC) before any municipal agency. “Personally appearing” includes any contact (telephone,

letter, appearances) with the intent to influence. *EC-COI-87-27*. Thus, you may not contact on behalf of ABC any office of city government, not only the city council. For example, you could not lobby the mayor to increase the allocation of CDBG funds to ABC.

Section 17 also prohibits you from receiving compensation from ABC in relation to particular matters in which the city has a direct and substantial interest. This means that you may not be involved as a salaried ABC employee in such activities as the obtaining of city building permits and the approval of completed weatherization work by city inspectors. You may not supervise or approve the work of other ABC employees to the extent that they are engaged in these activities. However, §17 will not prevent your receiving a salary from ABC for your work on the weatherization program that is not related to these city permits and inspections, including your general management and supervision of the program, since we have previously decided that not all work done pursuant to such permits is “in relation to” the permit. *EC-COI-90-13; 87-31*.

Section 19

In relevant part, §19 of c. 268A prohibits a municipal employee from participating^{5/} in any particular matter in which he, or a business organization in which he is serving as an employee, has a direct or a reasonably foreseeable financial interest. The financial interest may be of any size, and may be a positive or a negative interest. In addition, this section prohibits participating in matters which affect competitors’ financial interests.

This section would prohibit you from, among other things, participating in any way in city decisions about funds for which ABC might be eligible. For example, you could not vote on or otherwise participate in any decision about a budget line item that explicitly or implicitly appropriated funds for ABC; you should leave the room before discussion of any such line item begins. *Graham v. McGrail*, 370 Mass. 133, 138, 140 (1976). You could, however, vote on and participate in decisions about the budget as a whole. *Id.* at 140. The same analysis would apply to any city decisions about allocating funds. For example, you could not participate in any decision about whether to allocate a CDBG low-income housing grant to ABC or to one of its competitors for such funds.

You are also prohibited from acting, as a city councillor, on any other matter in which you or ABC have a direct or reasonably foreseeable financial interest, such as a zoning change affecting property abutting ABC’s property.

Section 20

Section 20 of c. 268A prohibits a municipal employee from having a direct or indirect financial interest in a contract made by a municipal agency of the same city, unless an exemption applies. Some of ABC’s funding arrangements with the city constitute “contracts” with a municipal agency, since they require ABC to perform certain obligations in return for the funds. *EC-COI-88-1; 87-40*. However, you will have no financial interest in these contracts if, as you state, your ABC compensation will derive entirely from sources other than the city and over which the city exercises no control. *EC-COI-88-1; 87-4*. Under these conditions, §20 would not prevent you from accepting this position with ABC.

Section 20 would also prohibit you from, for example, contracting with other city agencies to provide any type of services for a fee. Nothing in your request raises any other issue under this section at this time.

Section 23

Section 23 contains other provisions which apply to you as a municipal employee. First, §23(b)(2) prohibits you from using or attempting to use your city councillor position to secure for yourself or others unwarranted privileges of substantial value (\$50 or more) which are not available to others similarly situated. For example, you may not use public resources, time, facilities, personnel or equipment, to benefit ABC. This section also requires that a municipal employee use objective criteria when deciding matters before him, and must keep independent any private relationship.

Furthermore, §23(c) prohibits disclosure or use of confidential information (i.e., information which is not accessible through a public records request) to benefit yourself or others, including ABC. For example, this section would prohibit your use of materials developed on city time to benefit ABC if those materials could not be

used by others in the same manner (i.e., through a public records request).

Date Authorized: January 16, 1992

^{1/}See §§201, 202(a), 205(d) of the Act.

^{2/}The principal congressional committee report asserts that “community action program” grants are “based on the belief that local citizens know and understand their communities best and that they will be the ones to seize the initiative and provide sustained, vigorous leadership.” H. Rep. No. 1458, 88th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 2900, 2909.

^{3/}“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

^{4/}“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{5/}“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).